No. 259

In the Supreme Court of the United States

OCTOBER TERM, 1960

JOHNNY ESPINOZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (R. 86–88) has not yet been reported. The opinion of the district court denying petitioner's motion to suppress appears at pages 75–76 of the record.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1960 (R. 89). A petition for rehearing was denied on July 1, 1960 (R. 94). The petition for a writ of certiorari was filed on July 22, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the seizure of the heroin from petitioner, following his arrest on probable cause, was reasonable.

STATEMENT

On January 6, 1960, after trial in the United States District Court for the Southern District of Texas, petitioner was convicted of violating the federal narcotic laws (21 U.S.C. 174), and was sentenced to ten years imprisonment as a second offender (R. 3, 77–78).[1]

Prior to trial petitioner moved to suppress narcotics seized from him following his arrest, asserting that the narcotics were obtained as a result of an unreasonable search and seizure (R. 4–8). After a hearing on his motion, the district court found that the search and seizure were incident to petitioner's lawful arrest on probable cause and therefore reasonable under the circumstances, and that the heroin seized was thus admissible (R. 75–76). In a *per curiam* opinion the court of appeals affirmed (R. 86–88).

The evidence presented on the motion to suppress may be summarized as follows:

1. Sometime between 8 and 9 p.m. on the night of June 24, 1959 (the evening preceding petitioner's arrest), federal narcotic agent Robinson received information from a reliable informant, who had previously worked with him in approximately ten cases, that

[1] He had previously been convicted on a narcotics charge in 1955, in the United States District Court for the Western District of Texas, San Antonio Division (R. 77).

petitioner would have heroin the next day to fill orders he had for it at his place of employment. The informant did not know if petitioner would pick up the heroin at home or elsewhere but did know that "when he got to work he would have it in his possession" (R. 52, 61, 68; see also R. 16–21, 24, 31). Agent Robinson further testified that he personally knew petitioner and had received information on previous occasions from two other reliable sources that petitioner was involved in the narcotics traffic (R. 62–66). Agent Battista, who, together with agents Robinson and Cerda, made the arrest of petitioner, testified that he had been advised that petitioner was a narcotics trafficker "for a long, long time" (R. 16); that he had received additional information to that effect about a week before the arrest; that he had kept petitioner under surveillance on previous occasions because of such information; and that he knew that petitioner had a "lengthy record" of narcotic convictions. He further stated that the "positive information"—the reliable informant's statement that petitioner would be possessed of heroin on the morning of June 25, 1959—was obtained the night before the arrest (R. 16, 19–21, 23–26).

2. At approximately 6 a.m. on the morning of June 25, 1959, agents Robinson, Battista and Cerda drove to the parking area adjacent to petitioner's place of employment (R. 10–11, 56–57). Shortly after their arrival, petitioner pulled into the parking area. The agents thereupon pulled alongside petitioner's car just as he was opening his door to get out (R. 13, 57).

Robinson then got out of the car,[2] informed petitioner he was a federal narcotic officer, and told him he was arresting him for a violation of the federal narcotic laws. At this point, petitioner pushed at the agent, tried to close the car door, and grabbed a white piece of paper containing white powder from the car seat and put it in his mouth (R. 57–58). Agent Robinson put his arm around petitioner's neck to prevent him from "swallowing the evidence." A scuffle ensued, and they both fell out of the car onto the ground (R. 58–60). Battista immediately went to Robinson's aid. He tried unsuccessfully to stick his finger into petitioner's mouth to keep him from swallowing the powder, but to no avail. He then placed his finger in petitioner's nose to force his mouth open (R. 15), and thus prevented petitioner from swallowing the powder. The powder dropped out from petitioner's mouth into his hand; petitioner thereupon threw away the powder which was immediately recovered by agent Cerda (R. 15, 60).[3] The officers had the powder field tested and found that it was an opium derivative (R. 66).

ARGUMENT

1. It is settled that police officers may search a person without a warrant and seize evidence so found, if the search and seizure are incident to a lawful arrest. See, *e.g.*, *Abel* v. *United States*, 362 U.S. 217; *Draper* v. *United States*, 358 U.S. 307, 311; *Agnello* v. *United*

[2] Agent Battista was driving, agent Cerda was sitting next to him and agent Robinson was sitting in the rear (R. 13).

[3] Agent Cerda did not take part in the struggle with petitioner. He had run around to the other side of petitioner's car to retrieve the powder thrown away by petitioner (R. 29–30).

States, 269 U.S. 20, 30; *Carroll* v. *United States*, 267 U.S. 132, 158. Unlike the situation in *Rochin* v. *California*, 342 U.S. 165, in which the officers' conduct was illegal from the time defendant was arrested without probable cause until the evidence was seized,* the narcotic agents in the present case had probable cause to arrest petitioner on June 25, 1959, for a narcotics offense because the agents not only had a general knowledge that petitioner was involved in narcotics traffic, but they also had received particularized information from a reliable informant the evening before the arrest that petitioner would have heroin in his possession the next day when he got to work. Compare *Draper* v. *United States*, *supra* at 312–313; *Brinegar* v. *United States*, 338 U.S. 160, 175. Once having placed petitioner under arrest, the agents were then authorized, as an incident to that arrest, to search the person of petitioner and seize the contraband heroin.

2. Moreover, the nature and extent of the search and seizure in the present case accorded with the standard of reasonableness in the Fourth Amendment, even if that standard be considered more stringent than the Due Process limitations delineated in *Rochin* v. *California*, *supra*, and *Breithaupt* v. *Abram*, 352 U.S. 432. There is no justification for petitioner's contention that the search and seizure went beyond the bounds of reasonableness because force was employed. It is established doctrine that one under law-

* In *Rochin*, after unlawfully breaking into the defendant's dwelling, the state agents "jumped upon him" and forcibly sought to extract narcotic capsules he had placed in his mouth, and, when this method failed, had his stomach pumped against his will in order to extract the narcotics.

ful arrest may be subjected to the force necessary to unlock his clenched fist (*Draper* v. *United States*, *supra* at 310), or to have relevant evidence taken from him which he has tried to hide up his sleeve (*Abel* v. *United States*, *supra* at 238). Similarly the police need not stand helplessly by in executing a lawful arrest, when the person arrested seeks to wash narcotics down the drain, or otherwise attempts to destroy or secrete such easily transferrable contraband. Cf *United States* v. *Kraus*, 270 Fed. 578, 582 (S.D. N.Y.). In *Blackford* v. *United States*, 247 F. 2d 745 (C.A. 9), certiorari denied, 356 U.S. 914, it was held that, after a legal arrest on probable cause, the removal of narcotics from the defendant's rectum by scientific procedures and under sanitary conditions was not an unreasonable search and seizure. See also *Barrera* v. *United States*, 276 F. 2d 654 (C.A. 5); *King* v. *United States*, 258 F. 2d 754 (C.A. 5), certiorari denied, 359 U.S. 939.*

The cases show that "[A]n arresting officer is free to take hold of articles which he sees the accused deliberately trying to hide. This power derives from the dangers * * * that relevant evidence will be destroyed." *Abel* v. *United States*, *supra* at 238. The cases also demonstrate that there is no hard and fast

* It is also established that if one forcibly resists lawful arrest, law enforcement agents may use such force as is necessary under the circumstances to effectuate the arrest. See, *e.g.*, *Bell* v. *United States*, 254 F. 2d 82, 85 (C.A. D.C.), certiorari denied, 358 U.S. 885; cf. *Costner* v. *United States*, 252 F. 2d 496 (C.A. 6). Similarly, federal law enforcement officers may employ force to gain entry to premises to execute a search warrant (18 U.S.C. 3109), or to arrest on probable cause (*Miller* v. *United States*, 357 U.S. 301), if, after announcing their authority and purpose, they are denied entry.

rule as to when and to what extent force may be applied in effectuating a search and seizure. Rather, they indicate that the question is whether a police officer or agent acted reasonably under all the circumstances. In the present case, when federal narcotic officers, having probable cause to arrest petitioner, lawfully did so during daylight hours in a public parking area, petitioner became violent and attempted to hide the evidence by swallowing it. In the face of this instantaneous resistance to lawful police activity, the officers justifiably used a minimum of force to prevent the destruction of the easily disposable, relevant evidence and to avoid the need for any medical procedures to extract the evidence.[6] No blows were struck and the scuffle terminated as soon as petitioner was prevented from swallowing the heroin (R. 60, 66). In short, the police action here was entirely reasonable under all the circumstances.[7] The courts below therefore properly ruled that the heroin was admissible in evidence.

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[6] It may well be that in preventing petitioner from swallowing the heroin, the agents protected his physical condition, for, as agent Robinson testified: "I thought he had swallowed more than one dram of heroin, and I knew if it dissolved in his stomach, it would kill him" (R. 66–67). Compare *Blackford* v. *United States*, *supra* at 747. After the seizure of the narcotics from him, petitioner was taken to a hospital but refused—a refusal which was honored—to have his stomach pumped (R. 67).

[7] Since the search and seizure were not unreasonable, there can be no question of any violation of the prohibitions of the Due Process Clause of the Fifth Amendment. And of course there is no merit to petitioner's contention that the use of the evidence violated his constitutional privilege against self-incrimination. See *Blackford* v. *United States*, *supra* at 753–754; 8 Wigmore, *Evidence* § 2264(2), at 364–372 (3d ed. 1940).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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